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JELI ANAK NAGA & ORS v. TUNG HUAT PELITA NIAH PLANTATION SDN BHD & ORS

FEDERAL COURT, PUTRAJAYA
AHMAD MAAROP PCA
ZAHARAH IBRAHIM CJ (MALAYA)
B ALIZATUL KHAIR OSMAN FCJ
ABANG ISKANDAR FCJ
NALLINI PATHMANATHAN FCJ
[CIVIL APPEAL NO: 01(f)-25-08-2018 (Q)]
18 OCTOBER 2019

C

LAND LAW: *Customary land – Native customary rights ('NCR') – Whether natives acquired or inherited NCR over land – Whether NCR restricted only to cultivated areas – Whether practice of 'pemakai menoa' and 'pulau' were NCR having recognition of law within art. 160(2) of Federal Constitution ('FC') – Phrase* D *'having the force of law' in art. 160(2) of FC – Whether not all customs and usages fell within definition of law – Whether recognition that custom or practice existed sufficient – Whether rights of native confined to area of their settlement and not where they foraged for food – Whether correct statement of law*

The appeal arose from two actions filed in the High Court, *ie*: (i) Originating E Summons No: 24-44-2010 (MR) ('OS'); and (ii) Civil Suit No: 21-5-2011 ('civil suit'). A parcel of land ('Lot 2'), which was first alienated to Land Custody and Development Authority ('LCDA'), was alienated to Tung Huat Pelita Niah Plantation Sdn Bhd ('Tung Huat'), the plaintiff in the OS, under a provisional lease ('PL') of State land. Upon discovering the presence of F several parties on the land, Tung Huat filed the OS against the non-native defendants ('defendants') to recover possession of the land under O. 89 of the Rules of the High Court 1980 ('RHC'). The defendants opposed Tung Huat's application on the ground that they had legally purchased or acquired or had been assigned the native customary rights ('NCR') land within Lot 2. The G defendants claimed that the plaintiffs in the civil suit ('plaintiffs') who held NCR over the whole of Lot 2 had sold, transferred and/or assigned various parcels of the land within Lot 2 to the first defendant in the OS, which land were then developed into oil palm plantation by the other defendants in the OS. Subsequently, the plaintiffs filed the civil suit against Tung Huat, LCDA, Superintendent of Land and Surveys, Miri Division and the H Government of the State of Sarawak claiming, *inter alia*, for a declaration that they had NCR over an area of land situated at Sibuti, which included an area under the PL issued to Tung Huat. The plaintiffs pleaded that their NCR over the land had not been extinguished and that they had not been compensated when Lot 2 was alienated to Tung Huat. The High Court Judge ('HCJ') held, I *inter alia*, that: (i) that the first defendant in the OS was a Malay from Sibu

and not an Iban and not from Sibuti and according to Adat Iban 1993, the residents of Rumah Tinggi, Rumah Balau, Rumah Rajit and Rumah Jambai could not sell, assign, transfer the land within Lot 2 to the first defendant in the OS or to the OS defendants who had acquired, occupied and planted oil palms there; (ii) the plaintiffs had not acquired or inherited NCR over the land within Lot 2 except for the 380 hectares which were cleared prior to 1958 and therefore, the plaintiffs could not sell, transfer or assign the land within Lot 2 to the OS defendants; (iii) there was no evidence that the OS defendants had legally purchased or acquired or been assigned NCR land within the said 380 hectares or within Lot 2 or that they had entered and occupied the land within Lot 2 with the licence or consent of Tung Huat or its predecessors in title. Hence, in the OS, the HCJ held that Tung Huat, being the registered owner of Lot 2, was entitled to recover and had possession of Lot 2, except for the 380 hectares. In the civil suit, the HCJ allowed the plaintiffs' claim to the extent that the plaintiffs had NCR over 380 hectares of the land, which were to be excluded and excised from Lot 2. The OS defendants appealed to the Court of Appeal against the order of the High Court in the OS, whilst the plaintiffs appealed against the whole decision in the civil suit. Tung Huat filed a cross-appeal in respect of the order that the plaintiffs had NCR over 380 hectares within Lot 2. The Court of Appeal affirmed the decisions of the HCJ in the OS and the civil suit.

Hence, the plaintiffs obtained leave to appeal to the Federal Court on the following questions of law: (i) whether the Court of Appeal's decision in *Superintendent of Lands & Surveys, Bintulu & Ors v. Nor Anak Nyawai & Ors And Another Appeal* ('*Nor Anak Nyawai*'), that the rights of the natives is confined to the area where they settled and not where they foraged for food, was a correct statement of the law relating to the extent and nature of rights to land claimed under NCR in Sarawak; and (ii) whether the alleged practice of the Iban to preserve an area of jungle or forest as '*pulau*' for access for food, wildlife and forest produce, gave rise to exclusive rights to the land in the '*pulau*'. It was the plaintiffs' submission that, in answering question no. 3 in *Director of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors and Other Appeals* ('*TR Sandah*'), the majority panel first had to decide on the question whether the custom of '*pemakai menoa*' and '*pulau galau*' had the force of law under art. 160 of the Federal Constitution ('Constitution'). In this regard, the plaintiffs submitted that the NCR custom of '*pemakai menoa*' and '*pulau galau*' had the force of law because it had been recognised and enforced by common law in this country and throughout the Commonwealth. Therefore, if NCR over the areas where natives roam for forest food and jungle produce is recognised by common law throughout Commonwealth which in Malaysia include Sarawak practices, if NCR over areas where natives roam and forage for forest food and jungle produce is part of common law including Sarawak as it has been recognised and enforced by the Malaysia Courts and if common

law is substantive law on par with written law and if common law does fall under the definition of 'law' under art. 160(2) of the Constitution, and if NCR do not owe their existence to statute, then it must necessarily mean that NCR under '*pemakai menoa*' and '*pulau galau*' have the force of law and the implication is therefore, that to confine NCR to only areas where they settled and not where they foraged for forest food was not the correct statement of the law. The plaintiffs thus submitted that the first question should be answered in the negative, and the second question should be answered in the affirmative.

Held (dismissing appeal with costs; affirming decisions of High Court and Court of Appeal)
Per Ahmad Maarop PCA delivering the judgment of the court:

(1) The HCJ found that the plaintiffs' ancestors or predecessors had migrated and settled in the area claimed since 1930s and that the plaintiffs had acquired or inherited NCR over an area of land at Sibuti area. In determining the size of the NCR land that the plaintiffs acquired or inherited, the HCJ accepted the evidence of DW3, wherein, from the aerial photographs and report made by DW3, the ancestors and/or the plaintiffs was found to have cleared 380 hectares between 1951 and 1962. Therefore, on a balance of probabilities, the HCJ found that the plaintiffs had acquired NCR over 380 hectares of the land inside Lot 2. The Court of Appeal found ample evidence to support the findings of the HCJ. The Court of Appeal held that the HCJ's decision was consistent with the majority of the Federal Court in *TR Sandah*. Having considered all the evidence and material and having found that the findings of the HCJ were supported by evidence, there was no appealable error warranting intervention (paras 23-25)

(2) In *TR Sandah*, the majority did not agree with the decision of the Court of Appeal which ruled that the practice of '*pemakai menoa*' and '*pulau*' did exist and were NCR having recognition of law within the meaning under art. 160(2) of the Constitution. The court further held the words 'having the force of law' in art. 160(2) of the Constitution must be taken to mean that not all customs or usages come within the definition and implies that there are customs and usages which do not have the force of law and hence not within the definition of law. It was also held that there are customs which the laws of Sarawak does not recognise and hence do not form part of the customary laws of the natives of Sarawak and remain merely as practices or usages of the native and therefore, they do not come within the definition of law under art. 160(2) of the Constitution. (para 19)

(3) The majority in *TR Sandah* agreed with the principles propounded in *Nor Anak Nyawai* wherein it was held that the NCR claim over land founded upon the concept of continuous occupation does not extend to the areas of forests where the natives or their ancestors had entered into in search of food, jungle produce, *etc*. It held that the courts recognised the custom of '*temuda*', which is cultivation of land for occupation and the custom is essential and integral to the Iban culture which included the custom of clearing, occupying and cultivating an area and included burial grounds and longhouse sites. Recognition that such custom or practice existed was held to be not enough, as recognition of the existence of such practice had brought with it regulation and restriction. (para 19)

(4) In reference to the recognition conferred by the common law, the majority in *TR Sandah* held, amongst others, that 'Although common law recognises unregistered native customs, this is subject to the adherence of all tenets of customary land law. It is a well-established principle that having established that the custom of '*pemakai menoa*' and '*pulau*' exists, at the very least as a matter of fact, common law as developed in Malaysia further requires continues occupation and/or maintenance of the land in question.' '… the native customs of '*pemakai menoa*' through the establishment of '*pulau*' falls short of the prerequisites as provided for under s. 5(2) of the Sarawak Land Code and thus, do not have the force of law as envisaged under art. 160 of the Constitution'. (para 19)

(5) In answering question 3 in *TR Sandah*, which was the same as question (i) in this appeal, in the affirmative, the majority held that 'the rights of the native is confined to the area where they settled and not where they foraged for food is a correct statement of the law relating to the extent of native of rights to land claimed under native customary rights in Sarawak.' Therefore, question (i) was also answered in the affirmative. In view of the answer to question (i), and applying the majority of judgment in *TR Sandah*, question (ii) was answered in the negative. (paras 20 & 21)

Bahasa Malaysia *Headnotes*

Rayuan ini berbangkit daripada dua tindakan yang difailkan di Mahkamah Tinggi, iaitu: (i) Saman Pemula No: 24-44-2010 (MR) ('SP'); dan (ii) Guaman Sivil No 21-5-2011 ('guaman sivil'). Satu bidang tanah ('Lot 2') yang terlebih dahulu diberi milik kepada Lembaga Pembangunan dan Lindungan Tanah ('LCDA'), telah diberi milik kepada Tung Huat Pelita Niah Plantation Sdn Bhd ('Tung Huat'), plaintif dalam SP, bawah pajakan sementara ('PL') tanah Negeri. Mengetahui tentang kehadiran beberapa pihak atas tanah tersebut, Tung Huat memfailkan SP terhadap defendan-defendan bukan anak negeri ('defendan-defendan') untuk mendapatkan semula milikan tanah tersebut bawah A. 89 Kaedah-kaedah Mahkamah

A Tinggi 1980 ('KMT'). Defendan-defendan membantah permohonan Tung Huat atas alasan mereka membeli atau memperoleh atau diberi hak secara sah hak-hak anak negeri ('NCR') tanah tersebut dalam lingkungan Lot 2. Defendan-defendan menyatakan bahawa plaintif-plaintif dalam guaman sivil ('plaintif-plaintif') yang memegang NCR atas keseluruhan Lot 2 telah
B menjual, memindah milik dan/atau menyerah hak beberapa bidang tanah dalam lingkungan Lot 2 kepada defendan pertama dalam SP, dan tanah tersebut kemudian dibangunkan menjadi ladang kelapa sawit oleh defendan-defendan lain dalam SP. Kemudian, plaintif-plaintif memfailkan guaman sivil terhadap Tung Huat, LCDA, Penguasa Tanah dan Survei, Bahagian
C Miri dan Kerajaan Negeri Sarawak menuntut, antara lain, deklarasi bahawa mereka mempunyai NCR atas kawasan yang terletak di Sibuti, termasuk kawasan dalam PL yang dikeluarkan kepada Tung Huat. Plaintif-plaintif memplidkan bahawa NCR mereka atas tanah tersebut tidak pernah dipadamkan dan mereka tidak dipampas apabila Lot 2 diberi milik kepada Tung Huat. Hakim Mahkamah Tinggi ('HMT') memutuskan, antara lain,
D bahawa: (i) defendan pertama dalam SP seorang Melayu dari Sibu dan bukan Iban dan bukan dari Sibuti dan menurut Adat Iban 1993, penduduk-penduduk Rumah Tinggi, Rumah Balau, Rumah Rajit and Rumah Jambai tidak boleh menjual, memberi hak, memindah milik tanah dalam lingkungan Lot 2 kepada defendan pertama dalam SP atau kepada defendan-defendan SP
E yang memperoleh, menduduki dan menanam kelapa sawit di situ; (ii) plaintif-plaintif tidak memperoleh atau mewarisi NCR atas tanah dalam lingkungan Lot 2 kecuali 380 hektar yang dibersihkan sebelum 1958 dan oleh itu, plaintif-plaintif tidak boleh menjual, memindah milik atau memberi hak tanah dalam lingkungan Lot 2 kepada defendan-defendan SP; (iii) tiada
F keterangan bahawa defendan-defendan SP membeli atau memperoleh atau diberi hak NCR tanah dalam lingkungan 380 hektar atau dalam lingkungan Lot 2 secara sah atau mereka memasuki dan menduduki tanah dalam lingkungan Lot 2 dengan lesen atau persetujuan Tung Huat atau pendahulu dalam hak milik. Oleh itu, dalam SP, HMT memutuskan bahawa Tung Huat,
G sebagai pemilik berdaftar Lot 2, berhak mendapatkan semula dan mempunyai milikan Lot 2, kecuali 380 hektar. Dalam guaman sivil, HMT membenarkan plaintif-plaintif menuntut setakat yang plaintif mempunyai NCR terhadap 380 hektar tanah, yang dikecualikan dan dipotong daripada Lot 2. Defendan-defendan SP merayu ke Mahkamah Rayuan terhadap perintah Mahkamah Tinggi dalam SP, manakala plaintif-plaintif merayu
H terhadap keseluruhan keputusan guaman sivil. Tung Huat memfailkan rayuan balas berkaitan dengan perintah bahawa plaintif-plaintif mempunyai NCR atas 380 hektar dalam Lot 2. Mahkamah Rayuan mengesahkan keputusan-keputusan HMT dalam SP dan guaman sivil.

I

Oleh itu, plaintif-plaintif memperoleh kebenaran untuk merayu ke Mahkamah Persekutuan atas soalan-soalan undang-undang berikut: (i) sama ada keputusan Mahkamah Rayuan dalam *Superintendent of Lands & Surveys, Bintulu & Ors v. Nor Anak Nyawai & Ors And Another Appeal* ('*Nor Anak Nyawai*'), bahawa hak-hak anak negeri terhad pada kawasan penetapan mereka dan bukan kawasan mereka mencari makanan, adalah kenyataan undang-undang yang benar berkaitan dengan takat dan sifat hak-hak terhadap tanah bawah NCR di Sarawak; dan (ii) sama ada amalan masyarakat Iban untuk memelihara kawasan rimba atau hutan sebagai '*pulau*' untuk mendapat makanan, hidupan liar dan sumber hutan, membangkitkan hak eksklusif atas tanah terhadap '*pulau*'. Plaintif-plaintif menghujahkan bahawa, menjawab soalan 3 dalam *Director of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors and Other Appeals* ('*TR Sandah*'), panel majoriti terlebih dahulu perlu memutuskan soalan sama ada amalan '*pemakai manoa*' dan '*pulau galau*' mempunyai kuat kuasa undang-undang bawah per. 160 Perlembagaan Persekutuan ('Perlembagaan'). Dalam hal ini, plaintif-plaintif menghujahkan bahawa amalan NCR '*pemakai menoa*' dan '*pulau galau*' mempunyai kuat kuasa undang-undang kerana ini diiktiraf dan dikuat kuasa oleh common law dalam negara ini dan keseluruhan Komanwel. Oleh itu, jika NCR atas kawasan-kawasan di mana orang asal merayau untuk makanan dan hasil hutan diiktiraf oleh common law di keseluruhan Komanwel dan di Malaysia termasuk amalan-amalan Sarawak, jika NCR atas kawasan yang mana orang asal merayau dan mencari makanan dan hasil hutan adalah sebahagian common law termasuk Sarawak kerana ini telah pun diiktiraf dan dikuatkuasakan oleh mahkamah-mahkamah Malaysia dan jika common law adalah undang-undang substantif yang sama rata dengan undang-undang bertulis dan jika common law terangkum bawah definisi 'undang-undang' bawah per. 160(2) Perlembagaan dan jika NCR tidak berasal dari statut, ini bermaksud NCR bawah '*pemakai menoa*' dan '*pulau galau*' mempunyai kuat kuasa undang-undang dan dengan itu, implikasinya adalah, demi mengehadkan NCR hanya di kawasan mereka menetap dan bukan tempat mereka merayau untuk makanan hutan bukan pernyataan undang-undang yang benar. Oleh itu, plaintif-plaintif menghujahkan bahawa soalan pertama wajar dijawab secara negatif dan soalan kedua mesti dijawab secara afirmatif.

Diputuskan (menolak rayuan dengan kos; mengesahkan keputusan Mahkamah Tinggi dan Mahkamah Rayuan)

Oleh Ahmad Maarop PMR menyampaikan penghakiman mahkamah:

(1) Hakim Mahkamah Tinggi mendapati nenek moyang atau pendahulu telah berpindah dan menetap di kawasan yang dituntut semenjak tahun 1930an dan plaintif-plaintif memperoleh atau mewarisi NCR dari kawasan tanah di Sibuti. Dalam menentukan saiz tanah NCR yang diperoleh atau diwarisi plaintif-plaintif, HMT menerima keterangan

DW3 dan daripada fotograf udara dan laporan DW3, nenek moyang dan/atau plaintif-plaintif didapati telah membersihkan 380 ekar antara 1951 dan 1962. Oleh itu, atas imbangan kebarangkalian, HMT mendapati plaintif-plaintif telah memperoleh NCR untuk 380 hektar daripada tanah dalam Lot 2. Mahkamah Rayuan mendapati keterangan cukup untuk menyokong dapatan HMT. Mahkamah Rayuan memutuskan keputusan HMT konsisten dengan majoriti dalam kes *TR Sandah*. Setelah mempertimbangkan kesemua keterangan dan material dan mendapati dapatan-dapatan HMT disokong keterangan, tiada kekhilafan yang boleh dirayu yang mewajarkan campur tangan.

(2) Majoriti dalam kes *TR Sandah* tidak menyetujui keputusan Mahkamah Rayuan yang memutuskan bahawa amalan '*pemakai menoa*' dan '*pulau*' wujud dan adalah NCR yang diiktiraf undang-undang dalam maksud bawah per. 160(2) Perlembagaan. Mahkamah selanjutnya memutuskan perkataan-perkataan 'having the force of law' dalam per. 160(2) Perlembagaan membawa maksud bahawa bukan kesemua adat atau kegunaannya terangkum dalam definisi dan menyiratkan bahawa terdapat adat dan kegunaan yang tiada kuat kuasa undang-undang dan oleh itu, tidak terangkum dalam definisi undang-undang. Juga dihujahkan bahawa wujud adat yang tidak diiktiraf oleh undang-undang Sarawak dan oleh itu, tidak membentuk sebahagian undang-undang anak negeri Sarawak dan kekal sebagai amalan atau digunakan oleh anak negeri dan oleh itu, tidak terangkum dalam definisi undang-undang bawah per. 160(2) Perlembagaan.

(3) Majoriti dalam kes *TR Sandah* menyetujui prinsip yang digunakan dalam kes *Nor Anak Nyawai* yang memutuskan bahawa tuntutan NCR atas tanah yang berasaskan konsep pendudukan berterusan tidak terlanjut pada kawasan hutan yang dimasuki orang asal atau nenek moyang mereka untuk mencari makanan, hasil hutan dan lain-lain. Kes itu memutuskan bahawa mahkamah mengiktiraf adat '*temuda*', iaitu pengusahaan tanah untuk pendudukan, dan adat itu utama dan penting dalam adat Iban yang termasuk adat membersihkan, menduduki dan mengusahakan satu-satu kawasan dan termasuk tanah pengebumian dan kawasan rumah panjang. Pengiktirafan bahawa adat atau amalan sedemikian wujud diputuskan tidak mencukupi, kerana pengiktirafan wujudnya amalan sedemikian melibatkan peraturan dan batasan.

(4) Merujuk pengiktirafan yang diberi common law, majoriti dalam kes *TR Sandah* memutuskan, antara lain, bahawa 'Although common law recognises unregistered native customs, this is subject to the adherence of all tenets of customary land law. It is a well-established principle that having established that the custom of '*pemakai menoa*' and '*pulau*' exists,

at the very least as a matter of fact, common law as developed in Malaysia further requires continues occupation and/or maintenance of the land in question.' '… the native customs of '*pemakai menoa*' through the establishment of '*pulau*' falls short of the prerequisites as provided for under s. 5(2) of the Sarawak Land Code and thus, do not have the force of law as envisaged under art. 160 of the Constitution'.

(5) Menjawab soalan 3 dalam kes *TR Sandah*, yang sama dengan soalan (i) dalam rayuan ini, secara afirmatif, panel majoriti memutuskan bahawa 'the rights of the native is confined to the area where they settled and not where they foraged for food is a correct statement of the law relating to the extent of native of rights to land claimed under native customary rights in Sarawak.' Oleh itu, soalan (i) juga dijawab secara afirmatif. Berdasarkan jawapan pada soalan (i), dan mengguna pakai penghakiman majoriti dalam kes *TR Sandah*, soalan (ii) dijawab secara negatif.

Case(s) referred to:

Director of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals [2017] 3 CLJ 1 FC ***(refd)***

Douglas Ding Jangan & Ors v. Government of Sarawak & Ors [2019] 4 CLJ 18 CA ***(refd)***

Government of Sarawak & Anor v. Busing ak Jali & Ors And Another Appeal [2019] 4 CLJ 179 CA ***(refd)***

Superintendent of Lands & Surveys Miri Division & Anor v. Madeli Salleh [2007] 6 CLJ 509 FC ***(refd)***

Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal [2005] 3 CLJ 555 CA ***(foll)***

TR Sandah Tabau & Ors v. Director Of Forest, Sarawak & Anor And Other Applications [2019] 10 CLJ 436 FC ***(foll)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 77, 78(1), (2)
Federal Constitution, art. 160(2)
Land Code (Sarawak) (Cap 81), ss. 2, 5(2), 10
Rules of the High Court 1980, O. 89
Rules of the Federal Court 1995, r. 137

For the appellants - Joshua Baru Bian & Clarice Chan; M/s Baru Bian Advocs
For the 1st & 2nd respondents - Rajesh Jethi Singh; M/s Jethi & Assocs
For the 3rd & 4th respondents - Mohd Adzrul Adzlan & Emma Yusri; SLO, Sarawak

[Editor's note: For the Court of Appeal judgment, please see Jeli Naga & Ors v. Tung Huat Pelita Niah Plantation Sdn Bhd & Ors And Another Appeal [2019] 8 CLJ 598 (affirmed)
For the High Court judgment, please see [2014] 1 LNS 1343 (affirmed).]

Reported by S Barathi

A

JUDGMENT

Ahmad Maarop PCA:

[1] This judgment is prepared and delivered pursuant to s. 78(1) of the Courts of Judicature Act 1964, as Justice Zaharah Ibrahim CJ (Malaya) has since retired. My learned sister Justice Alizatul Khair Osman Khairuddin FCJ, my learned brother Justice Abang Iskandar Abang Hashim FCJ and my learned sister Justice Nallini Pathmanathan FCJ had read this judgment in draft and all of them agreed that this judgment be our judgment.

[2] The appeal in this case emanated from two actions filed in the High Court, namely, Originating Summons No: 24-44-2010 (MR) ("OS") and Civil Suit No: 21-5-2011 ("the civil suit"). Both actions were jointly tried. In the appeal, the parties will be referred to as they were in the judgment of the High Court. The plaintiff in the OS, (which is the first defendant in the civil suit) will be referred to as Tung Huat. The brief background facts which led to the filing of the two actions in the High Court and eventually the appeal before this court are these. On 7 February 2000, a parcel of land measuring more or less 3,361 hectares described as Lot 2, Block 9, Bukit Kisi Land District (Lot 2) was alienated to Tung Huat under a provisional lease (PL) of State Land. Before being alienated to Tung Huat, Lot 2 was first alienated to the Land Custody and Development Authority (LCDA). On discovering the presence of several parties on the land, Tung Huat filed the OS against non-native defendants to recover possession of the land under O. 89 Rules of the High Court 1980. The defendants in the OS opposed Tung Huat's application for possession of the land on the ground that they had legally purchased or acquired or had been assigned NCR land within Lot 2. The defendants claimed that the plaintiffs who held NCR over the whole of Lot 2 had sold, transferred and/or assigned various parcels of the land within Lot 2 to the first defendant in the OS, which land were then developed into oil palm plantation by the other defendants in the OS. As it transpired in the OS, Tung Huat and the sixth and the seventh defendants had agreed to settle the action and Tung Huat discontinued the action against them. The remaining defendants in the OS will be referred to as the OS defendants.

[3] Subsequently, the plaintiffs filed the civil suit in which the native plaintiffs sued Tung Huat (the first defendant), Land Custody and Development Authority (the second defendant), Superintendent of Land and Surveys, Miri Division (the third defendant) and the Government of the State of Sarawak (the fourth defendant). The plaintiffs claimed, *inter alia*, for a declaration that they have native customary rights (NCR) over an area of land situated at Sibuti, which included an area under a provisional lease (PL) issued to Tung Huat. The plaintiffs pleaded that their NCR over the land had not been extinguished and that they had not been compensated when Lot 2 was alienated to Tung Huat.

[4] In the joint trial, based on the evidence before the court, the learned judge of the High Court found that the plaintiffs have acquired NCR over the 380 hectares of land which were cleared. The learned High Court Judge found that on 1 January 1958, or even in 1962, the plaintiffs did not clear, had not settled in and have not acquired NCR over the rest of the area in Lot 2. The learned judge of the High Court further found that there is no evidence that the plaintiffs were asked or invited to settle inside Lot 2 either before or after 1 January 1958 by the third and the fourth defendants. There is also no evidence that they have any legitimate expectation to the land inside Lot 2.

[5] The learned judge of the High Court further held that the first defendant in the OS was a Malay from Sibu. He was not an Iban and not from Sibuti. According to Adat Iban 1993, the residents of Rumah Tinggi, Rumah Balau, Rumah Rajit and Rumah Jambai could not sell, assign, transfer the land within Lot 2 to the first defendant in the OS or to the OS defendants who had acquired, occupied and planted oil palms therein. The evidence showed that Lot 2 at all material times was State land. The evidence showed that the plaintiffs have not acquired or inherited NCR over the land within Lot 2 except for the 380 hectares which were cleared prior to 1958. Therefore, the plaintiffs had no NCR and could not sell, transfer or assign the land within Lot 2 to the OS defendants. There was no evidence that the OS defendants had legally purchased or acquired or been assigned NCR land within the said 380 hectares or within Lot 2. The OS defendants had not adduced any evidence that they entered and occupied the land within Lot 2 with the licence or consent of Tung Huat or that of its predecessors in title. Based on the evidence, the OS defendants had no right to occupy the land within Lot 2. Before acquiring the land from the residents of the longhouses stated earlier, the OS defendants should have checked the status of the land. They took the risk when they acquired the land. In the result, in the OS, the learned judge of the High Court held that Tung Huat being the registered owner of Lot 2 was entitled to recover and have possession of Lot 2, except for the 380 hectares shown in exh. D42. The OS defendants were also ordered to pay costs to Tung Huat.

[6] In the civil suit, the learned judge held that the plaintiffs had acquired NCR over 380 hectares of the land inside Lot 2 as shown in exh. D42. The plaintiffs' claim was allowed to the extent that the plaintiffs have NCR over 380 hectares of the land. The 380 hectares were to be excluded and excised from Lot 2. The learned judge made an order that the exact perimeter and the area of the 380 hectares in Lot 2 were to be confirmed by a ground survey to be jointly carried out by the plaintiffs and the defendants. The plaintiffs' prayers (i), (ii), (iii), (iv), (v), 15 (vi), (vii), (viii) and (ix) as set out in the statement of claim were dismissed.

[7] The OS defendants appealed to the Court of Appeal against the whole order of the High Court in the OS allowing Tung Huat's application for possession under O. 89 of the Rules of the High Court 1980 (Civil Appeal No: Q-02-485-03-2014). As for the civil suit, the plaintiffs appealed to the Court of Appeal against the whole decision of the learned judge of the High Court in dismissing the plaintiffs' claim as per prayers (i) to (ix) of the statement of claim. Tung Huat filed a cross-appeal in respect of the learned judge's order that the plaintiffs have NCR over 380 hectares within Lot 2 (Civil Appeal No: Q-01-94-03-2014).

[8] The following decisions were made in the two appeals:

(i) In Civil Appeal No: Q-02-485-03-2014, the Court of Appeal dismissed the OS defendants' appeal with costs.

(ii) In Civil Appeal No: Q-01-94-03-2014, the Court of Appeal:

(a) dismissed the plaintiffs' appeal; and

(b) dismissed Tung Huat's cross-appeal.

[9] In other words, the Court of Appeal affirmed the decisions made by the learned judge of the High Court in the OS and the civil suit.

[10] On 19 July 2018, the plaintiffs in Civil Appeal No: Q-01-94-03-2014, were given leave to appeal to the Federal Court on the following questions of law:

1. Whether the Court of Appeal's decision in *Superintendent of Lands & Surveys, Bintulu Division & Ors v. Nor ak Nyawai & Ors* [2005] 3 CLJ 555, that the rights of the Natives is confined to the area where they settled and·not where they foraged for food, is a correct statement of the law relating to the extent and nature of rights to land claimed under native customary rights in Sarawak? [Question 1]

2. Whether the alleged practice of the Iban to preserve an area of jungle or forest as 'pulau' for access for food, wildlife and forest produce, gives rise to exclusive rights to the land in the 'pulau'? [Question 2]

[11] Hence, the appeal before us.

Submission Of The Plaintiffs

[12] The substance of the submission of learned counsel for the plaintiffs is as follows. At the beginning of his submission, learned counsel for the plaintiffs said as a finding of fact on the evidence adduced, the High Court had already acknowledged and found that there was in fact occupation. Learned counsel stressed that occupation is not the issue. According to him, the question which arises is this – Does the NCR extend beyond the 380

hectares of cleared land which was allowed by the courts? He said his submission would address the issue whether NCR can exist over virgin forest areas or otherwise – the area for the natives to acquire food, and where they hunt and collect jungle produce. In other words, according to him, it is the "*Pemakai Menoa*" and the "*Pulau Galau*" issue. Learned counsel referred to *Director of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals* [2017] 3 CLJ 1. He submitted that in answering Question No. 3 in that case, the majority panel first had to decide on the question whether the custom of "*Pemakai Menoa*" and "*Pulau Galau*" had the force of law under art. 160(2) of the Federal Constitution. In this regard, he submitted that the NCR custom of "*Pemakai Menoa*" and "*Pulau Galau*" in fact had the force of law because it had been recognised and enforced by common law in this country and throughout the Commonwealth. Common law is in fact part and parcel of the definition of "law" under art. 160 of the Federal Constitution. Therefore, he argued that by extension, the custom of "*Pemakai Menoa*" and "*Pulau*" do have the force of law. He submitted that the question whether the custom of "*Pemakai Menoa*" and "*Pulau*" come within the definition of law under art. 160 of the Federal Constitution and therefore "having the force of law" in Sarawak undergirds the plaintiffs' answer to the two questions of law in respect of which leave to appeal to the Federal Court was granted in this case. Submitting further, he contended that in *TR Sandah* (*supra*), the Federal Court was equally divided 2-2 on its decision of the fundamental aspect of the appeal, namely, whether the custom of "*Pemakai Menoa*" and "*Pulau*" comes within the definition of "law" under art. 160 of the Federal Constitution. According to the learned counsel, Raus Sharif PCA and Ahmad Maarop FCJ in their judgment, had decided that the custom of "*Pemakai Menoa*" and "*Pulau*" did not come within the definition of "law" in art. 160 of the Federal Constitution and that therefore these customs were not "having the force of law" in Sarawak. Learned counsel submitted that on the other hand, the judgments of Her Ladyship Zainun Ali FCJ and His Lordship Abu Samah Nordin FCJ were in agreement with the custom of "*Pemakai Menoa*" and "*Pulau*" coming within the definition of "law" in art. 160(2) of the Federal Constitution and therefore "having the force of law" in Sarawak. Learned counsel contended that Abu Samah Nordin FCJ had in fact agreed on the law with the dissenting judgment and only allowed the appeal on a finding of facts. Learned counsel contended therefore that in *TR Sandah* (*supra*), the Federal Court was not decisive and that this court would be at liberty to depart from the decision in *TR Sandah* (*supra*) and make its own finding following the submission of the plaintiffs. Additionally, learned counsel also submitted, citing *Madeli Salleh* and *Nor ak Nyawai*, that native customary rights do not owe its existence to statutes and that they had been in existence long before any legislation, and that legislation would only be relevant to determine how much the native customary rights had been extinguished.

Submitting further on this point, learned counsel contended that requiring a precondition that custom must first be recognised by some qualifications or written law in Sarawak is in fact theoretical and makes no sense. Sarawak does not have to expressly recognise the custom for it to be given any force of law. Rounding up his submission, learned counsel submitted that if native customary rights over the areas where natives roam for forest food and jungle produce is recognised by common law throughout Commonwealth which in Malaysia include Sarawak practices, if native customary rights over areas where natives roam and forage for forest food and jungle produce is part of common law including Sarawak as it has been recognised and enforced by the Malaysia courts and if common law is substantive law on par with written law and if common law does fall under the definition of "law" under art. 160(2), and if native customary rights do not owe their existence to statute, then it must necessarily mean that native customary rights under *Pemakai Menoa* and *Pulau Galau* have the force of law, and if they do have the force of law, the implication is therefore, that to confine native customary rights to only areas where they settled and not where they forage for forest food is not the correct statement of the law. He submitted that the first question should be answered in the negative, and the second question should be answered in the affirmative.

Submissions Of The First And The Second Defendants

[13] The thrust of the submissions by learned counsel for the first and the second defendants is that on the facts there are concurrent findings of the High Court and the Court of Appeal that apart from the cleared area of 380 hectares within the provisional lease alienated to Tung Huat within Lot 2, the plaintiffs failed to prove that they have NCR over the balance of the provisional lease area through the concept of "*Pemakai Menoa*" and "*Pulau Galau*". According to the learned counsel, those were findings of fact which were not controverted. Learned counsel submitted that statute and common law in Sarawak only recognises cleared and cultivated land or "*temuda*" as method by which NCR can be acquired by natives over land in Sarawak, and not by the concepts of "*Pemakai Menoa*" or "*Pulau Galau*". He submitted that the Sarawak Land Code (Cap 81) was introduced to provide the cut-off date of 1 January 1958 so that under s. 5, from 1 January 1958, native customary rights may be created in accordance with native customary law of the community or communities concerned by any of the methods specified in sub-s. (2), if a permit is obtained under s. 10, upon interior area land. From 1 January 1958, the law requires that a permit under s. 10 is to be obtained to create and acquire NCR over land. Section 2 of the Land Code, *inter alia*, defines native customary land to mean land in which native customary rights, whether communal or otherwise, have lawfully been created prior to 1 January 1958 and still subsist as such. The concept of NCR under the

Sarawak Land Code requires clearance of land, its cultivation and continuous occupation. NCR can also be acquired by other modes mentioned under s. 5(2) of the Land Code and/or by way of inheritance or gift. Learned counsel submitted that the burden was on the plaintiffs to prove the acquisition of NCR according to the law of Sarawak in respect of the land cleared by them, which must be proven by evidence and not by bare assertions. He argued that the customs of "*Pemakai Menoa*" and "*Pulau Galau*" are not defined or clarified under Adat Iban 1993. He submitted that the customs of "*Pemakai Menoa*" or "*Pulau Galau*" were never recognised by any legislations or by the common law in Sarawak as methods by which NCR can be acquired by an Iban over lands in Sarawak, and hence never had the force of law. In support of his submission, learned counsel relied on *TR* Sandah, where he submitted that the Federal Court by way of a majority decision of 3-1 decided that the concepts of "*Pemakai Menoa*" and "*Pulau Galau*" do not have the force of law under art. 160(2) of the Federal Constitution, and were not methods by which NCR could be acquired in Sarawak. Hence, the only method by which NCR can be acquired by an Iban in Sarawak is through cultivation and occupation of land. He argued that the Federal Court held that customs of "*Pemakai Menoa*" and "*Pulau Galau*" were never recognised by any legislation or by the courts as customary law or methods by which NCR can be acquired by Ibans in Sarawak and hence, could not amount to common law in Sarawak. He submitted that both questions of law raised by the plaintiffs in this appeal were similar to question 1 and question 3 raised in *TR Sandah*. In his submission, learned counsel disagreed with the plaintiffs' contention that the decision in *TR Sandah* was by a majority of 2-2 and that there was a need to restate the law based on the same questions of law which were posed to the court in *TR Sandah*. According to him, the fact that *TR Sandah* was a majority decision has been accepted by the Court of Appeal in two other Court of Appeal decisions, namely:

(a) In *Douglas Ding Jangan & Ors v. Government of Sarawak & Ors* [2019] 4 CLJ 18; [2018] 2 SSLR 355, where Tengku Maimun Tuan Mat JCA (later CJ) held that:

> [42] In respect of the Plaintiffs' appeal, we were unanimous in our view that by the decision of the Federal Court in *TR Sandah,* which we were bound to follow, the Plaintiffs were not entitled to the balance area claimed, being the virgin jungle not cultivated.

(b) In *Government of Sarawak & Anor v. Busing ak Jali & Ors And Another Appeal* [2019] 4 CLJ 179; [2019] MLRAU 1, where Zaleha Yusof JCA held that:

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[21] The argument of the learned counsel for the Plaintiffs that the position is still not clear based on the judgment of Abu Samah Nordin FCJ in *TR Sandah* (*supra*), in our view, does not hold water. The Federal Court had dismissed the Plaintiffs' claim in *TR Sandah* (*supra*), based on 3-1 decision. Out of the 3 majority decision, 2 had confirmed the proposition that "what is essential as recognised by our courts is the custom of *temuda* which is cultivation of land for occupation. The custom is essential and integral to the Iban culture which would include the custom of clearing, occupying and cultivating an area and included burial grounds and longhouse sites.

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C **[14]** Learned counsel then urged this court to reaffirm the majority decision in *TR Sandah.*

Submissions Of The Third And Fourth Defendants

[15] In his submission, learned counsel for the third and the fourth
D defendants adopted the submissions of learned counsel for the first and the second defendants. Continuing his submission, learned counsel for the third and the fourth defendants referred to *Superintendent of Lands & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509 (FC), which was one of the cases referred to by learned counsel for the plaintiffs, and submitted as
E follows. This case had already been considered in *TR Sandah* by the majority. *Madeli Salleh* was decided on the basis of continuous occupation and control of the area. This is totally in line with the law of Sarawak prior to 1958 which are the Rajah Order, Fruit Trees Order, the Land Order, the Land Settlement Ordinance, Secretariat Secular 1939, *Tusun Tunggu* and finally Sarawak Land Code under s. 5 in chronological order. All these laws
F prior to the 1958 Land Code defined how NCR can be created which is by way of clearing the areas. This was the position of the laws prior to the 1958 Land Code. There is no change in the actual position. Hence, learned counsel reiterated that the decision in *TR Sandah* was correct; it was a majority decision, it was followed in the cases of *Douglas Ding Jangan & Others* (*supra*)
G and *Government of Sarawak & Another v. Busing anak Jali* (*supra*). All of these cases found in favour of the argument that this was a majority decision and it ought to be binding and ought to be the position of this court as well to follow the Federal Court in *TR Sandah*. The second question raised by the appellant in this case which was in relation to whether the alleged practice
H by the Iban to preserve an area of jungle or forest at *Pulau* for access of food, or wildlife and forest produce is a right to the land in *Pulau.* Firstly, it was argued that the question of NCR relates only to the question of areas where they have cleared and in continuous occupation. In theory, even if the laws of Sarawak were to recognise that they had or could have NCR over where they foraged, learned counsel questioned whether that right could be an

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exclusive right to the land whereby they can use the land as they deem fit, or basically deal with the land in any manner as they may deem fit under the Land Code? Learned counsel submitted that cannot be the case, because the custom is to forage the areas that are used to forage for food. Foraging does not grant them the rights over the land *per se*, but to the produce found on the land but not to the land itself. You cannot say that because I forage in that area, the land is now mine, I can sell the land, nobody can enter the land and that's it. Learned counsel submitted that the answer to question 2 must be in the negative.

Decision Of The This Court

[16] What the plaintiffs want this court to do is to re-examine the law and the cases which decided that the NCR should be confined only to the areas where the natives have settled and does not extend to the forest and the area where they forage for food. In essence, the plaintiffs wanted us to review and depart from the decision of the majority of this court in *TR Sandah* (*supra*) the leading case which had actually decided on the fundamental issue raised in this appeal. That is the crux of the plaintiffs' submission in this appeal. It is clear that question 1 in this appeal is the same as question 3 which was decided and answered by the majority panel of the Federal Court in *TR Sandah* (*supra*). Indeed, the learned counsel agreed with this. The learned counsel in his submission emphasised that this question undergirds the plaintiffs' answers to the two questions of law in respect of which leave to appeal was granted by this court in this case. In *TR Sandah* (*supra*) this court heard arguments by the parties at length. It is clear from the judgment of the majority panel that they have considered the submissions of the parties and the leading cases as well as the relevant law on the subject. The majority answered question 3 in the affirmative. To reiterate, the majority held that the Court of Appeal's decision in *Nor Anak Nyawai* (*supra*), that the rights of the native is confined to the area where they settled and not where they foraged for food is a correct statement of the law relating to the extent of native rights to land claimed under native customary rights in Sarawak. The reason given by learned counsel in his submission in support of the plaintiffs' appeal inviting us to reexamine *TR Sanda*h (*supra*) and depart from its decision was that the Federal Court was not decisive and was equally divided 2-2 in its decision on the fundamental aspect of the appeal, namely, whether the custom of "*Pemakai Menoa*" and "*Pulau*" comes within the definition of "law" under art. 160 of the Federal Constitution. According to the learned counsel, Raus Sharif PCA and Ahmad Maarop FCJ in their judgment, had decided that the custom of "*Pemakai Menoa*" and "*Pulau*" did not come within the definition of "law" in art. 160(2) of the Federal Constitution and that therefore these customs were not "having the force of law" in Sarawak.

Learned counsel submitted that on the other hand, the judgments of Her Ladyship Zainun Ali FCJ and His Lordship Abu Samah Nordin FCJ were in agreement with the custom of "*Pemakai Menoa*" and "*Pulau*" coming within the definition of "law" in art. 160(2) of the Federal Constitution and therefore "having the force of law" in Sarawak. Learned counsel contended that Abu Samah Nordin FCJ had in fact agreed on the law with the dissenting judgment and only allowed the appeal on a finding of facts. In other words, the contention is that there was no majority decision in *TR Sandah* (*supra*).

[17] We are unable to agree that in *TR Sandah* (*supra*) this court was equally divided 2-2. *TR Sandah* (*supra*) was a majority decision of 3-1. Abu Samah Nordin FCJ agreed with the decision of the majority. The majority judgment was delivered by Raus Shariff PCA (to which Ahmad Maarop FCJ concurred). Abu Samah Nordin FCJ wrote a supporting judgment. In this regard, it is opportune to add that very recently *TR Sandah* (*supra*) came to this court in three related applications for review under r. 137 of the Rules of the Federal Court 1995 ("RFC"), in the case of *TR Sandah Tabau & Ors v. Director Of Forest, Sarawak & Anor And Other Applications* [2019] 10 CLJ 436 ("TR Sandah review application"). In that case, the applicants filed three separate applications under r. 137 of the RFC for the following orders:

(i) An order that the majority and/or supporting judgments of the Federal Court delivered on 20 December 2016 in the three appeals, be set aside and the dissenting judgment be upheld and affirmed;

(ii) Further and/or in the alternative, an order under s. 78(2) of the Courts of Judicature Act 1964 for the rehearing of the three appeals; and

(iii) Such further and other directions as this court deems fit and proper.

[18] Essentially, in the TR Sandah review applications, it was contended that the supporting judgment of Abu Samah Nordin FCJ was wrong in "disturbing the findings of facts" of the learned trial judge which were in favour of the applicants and thereby causing injustice by not answering the questions of law posed for determination of the Federal Court. The applicants contended that only two of the remaining judges, namely, Raus Sharif PCA and Ahmad Maarop FCJ decided on the fundamental aspects of the appeal – whether the custom of "*Pemakai Menoa*" and "*Pulau*" comes within the definition of "law" under art. 160(2) of the Federal Constitution, and therefore "having the force of law" and answered the three questions of law. The applicants submitted that this effectively resulted in a minority determination, which caused the applicants to lose their appeals. The Federal Court did not accept that submission. The Federal Court made it clear that the Federal Court decided the three appeals in *TR Sandah* (*supra*) with a

3-1 majority. It undoubtedly was not a 2-2 decision. In *TR Sandah* the Federal Court had reversed the decisions of the Court of Appeal and the High Court and allowed the appeals with a 3-1 majority. Indeed in his supporting judgment, Abu Samah Nordin FCJ agreed with the conclusion arrived at by Raus Sharif PCA who delivered the majority judgment of the court. The appeals were determined according to the opinion of the majority of the judges composing the court as provided under s. 77 of the Courts of Judicature Act 1964. In delivering the judgment of the majority of the Federal Court (dated 11 September 2019), Azahar Mohamed CJM (with the concurrence of Alizatul Khair Osman Khairuddin FCJ, Mohd Zawawi Salleh FCJ and Idrus Harun FCJ) said:

> [19] This brings us to the second ground. It was argued that the supporting judgment of Abu Samah Nordin FCJ erred in "disturbing the findings of facts" of the learned trial judge, which were in favour of the applicants and thereby caused injustice to the applicants by not answering the 3 questions of law posed for determination by the Federal Court. *First and foremost, it is important to bear in mind that the Federal Court had reversed the decisions of the Court of Appeal and the High Court and allowed the appeal with a 3-1 majority. Another significant matter that must be noted is that Abu Samah Nordin FCJ in his supporting judgment had agreed with the conclusion arrived at by Raus Sharif PCA who delivered the majority judgment of the Court.* This is clearly mentioned in the supporting judgment of Abu Samah Nordin FCJ. In the words of the learned judge:
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> > [23] I have the benefit of reading the judgment of Justice Raus Sharif, PCA. The plaintiffs' claims to the disputed land is based on the native customary rights known as *pemakai menoa* and *pulau.* The central issue is whether the native customary rights known to the Iban community as *pemakai menoa* and *pulau* are recognised by the laws of Sarawak. If they are recognised by the laws of Sarawak, the next question is whether the plaintiffs have established their claims to the disputed land based on the native custom of *pemakai menoa* or *pulau*. This is a question of facts to be decided based on the evidence available before the court.
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> > [24] *On the facts of the case, I agree with Justice Raus Sharif, PCA that the appeals by the appellants be allowed and that the orders of the courts below be set aside.* After studying the records of appeal, reading the written submissions by learned counsel for both sides and hearing their oral submissions, I come to the conclusion that the plaintiffs have not established their claims to the disputed land on the balance of probabilities, for reasons which I will advert to later.
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> [20] What is even more patent is that at the last paragraph of his judgment, the learned judge said:

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> [59] Thus, *on the facts of the case, the appeals ought to be allowed and that the orders of the courts below should be set aside.* In the result I do not find it necessary to answer the questions posed in this Court. As to costs, each party to bear their own costs.

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[21] The applicants also argued that only two of the remaining judges, namely Raus Sharif PCA and Ahmad Maarop FCJ decided on the fundamental aspect of the appeals, namely, whether the custom of "*pemakai menoa*" and "*pulau*" comes within the definition of "law" in Article 160(2) of the Federal Constitution and therefore "having the force of law" and answered the three questions of law posed for determination by this Court. It was argued that this effectively resulted in a minority determination, which caused the applicants to lose their three appeals and this in itself is an injustice under rule 137 of RFC. We do not agree with this line of argument. In the first place, even though at the time of delivery of judgment, Abdull Hamid Embong FCJ had retired, there is no dispute that the judgment of the Federal Court was delivered pursuant to section 78(1) of the CJA by the remaining four judges on the panel. Therefore, at the time when judgment of the Federal Court was pronounced, the Federal Court was properly constituted and the judgments delivered cannot constitute a nullity. Furthermore, we agree with the submissions of Dato' Sri JC Fong, State Legal Counsel for the respondents to the effect that the three appeals were decided pursuant to section 77 of CJA, by a majority opinion of three judges on the panel who agreed that the three appeals be allowed and the orders of the Court of Appeal and the High Court be set aside. Although one of the three judges forming the majority declined to answer the three questions of law, it cannot be denied that for varying reasons the majority decided that the three appeals be allowed and the orders of the courts below be set aside. What is more, all this is accurately reflected in the sealed order of the Court dated 20.12.2016, which are in these terms:

ORDER

> … IT IS HEREBY ORDERED (by majority Md Raus Bin Sharif PCA, Ahmad Bin Haji Maarop FCJ and Abu Samah Bin Nordin FCJ concurring and Zainun Binti Ali FCJ dissenting and Abdull Hamid Embong FCJ having retired) that this Appeal is hereby be allowed AND IT IS FURTHER ORDERED that the orders of the courts below are hereby be set aside AND IT IS LASTLY ORDERED that each party shall bear and pay their own costs of this Appeal, and deposits, if any, to be refunded.
>
> GIVEN under my hand and the Seal of the Court on 20th day of December 2016.
>
> DEPUTY REGISTRAR
>
> FEDERAL COURT OF MALAYSIA PUTRAJAYA

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[22] What stands out is that as a matter of substance the sealed order itself emphatically spelled out the outcome of the three appeals: *three of the remaining four judges on the panel had decided that the appeals be allowed and only one of the judges dismissed the appeals. No confusion arises over the terms of the sealed order.* …

[23] Therefore, it is unmistakable that the Federal Court decided the three appeals with a 3-1 majority. The appeals were determined in accordance with the opinion of the majority of the judges composing the Court as provided for by section 77 of CJA. It undoubtedly was not a 2-2 decision. In our judgment, in the circumstances, the decision of the majority is not a nullity, and no injustice was caused to the applicants. The fact that the decision of the Federal Court is by a majority of the judges who heard the three appeals is not a ground for a review of that majority decision by another panel under rule 137 of RFC. In this regard, we refer to the judgment of Lord Wilberforce in *Fitzleet Estates Ltd v. Cherry (Inspector of Taxes)* [1977] 1 WLR 1345 at p. 1349 where his Lordship held:

> Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected. True that the earlier decision was by majority: I say nothing as to its correctness or as to the validity of the reasoning by which it was supported. That there were two imminently possible views is shown by the support for each by at any rate two members of the House. But doubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. It requires much more than doubts as to the correctness of such opinion to justify departing from it.

[19] There is no reason for us to depart from the majority decision in *TR Sandah* (*supra*). In fact, we express our agreement with it. In *TR Sandah* (*supra*), the majority did not agree with the decisions of the Court of Appeal which ruled that the practice of "*Pemakai Menoa*" and "*Pulau*" did exist and were native customary law having recognition of law within the meaning under art. 160(2) of the Federal Constitution. This is what the majority judgment said:

> The courts below ruled that the practice of "*pemakai menoa*" and "*pulau*" did exist and were native customary law having recognition of law within the meaning of art. 160(2) of the Federal Constitution.
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> [64] *With respect, we disagree.* This is not a case where we are called upon to consider whether such a practice exists or otherwise. Rather, what is pertinent here is whether the practice which exist has any force of law. In art. 160(2) of the Federal Constitution, "law" is defined as follows:
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> > Law includes written law, the common law in so far it is in operation in the Federation or any part thereof, and any custom or usage having the force of law.

A [65] The words "having the force of law" in art. 160(2) of the Federal Constitution are highly important as these words qualify the types of customs and usages which could come under the definition of law. *These important words "having the force of law" must be taken to mean not all customs or usages come within the definition and implies that there are customs and usages which do not have the force of law and hence not within the definition of law.*

B [66] In the present appeals, the courts below should take into account the definition of customary laws under Sarawak State Laws which has been defined to mean "customs which the laws of Sarawak recognise". This must be taken to mean existing customs which have the force of law. Put simply, there are customs which the laws of Sarawak does not recognise C and hence do not form part of the customary laws of the natives of Sarawak and remain merely as practices or usages of the native. They are not integral to the particular community in question and remain incidental. As such they do not come within the definition of law under art. 160(2) of the Federal Constitution.

D [67] We must not lose sight of an important fact that recognition alone that such custom or practice exist is not enough. Clearly, recognition of the existence of such practice had brought with it regulation and restriction. *Our position is consistent with the principle as propounded in the case of Nor Anak Nyawai wherein it was held that the native customary rights claim over land founded upon the concept of continuous occupation does not extend to the* E *areas of forests where the natives or their ancestors had entered into in search of food, jungle produce etc. What is essential as recognised by our courts is the custom of "temuda" which is cultivation of land for occupation. This custom is essential and integral to the Iban culture which would include the custom of clearing, occupying and cultivating an area and included burial grounds and longhouse sites.*

F [68] As stated earlier, what the laws of Sarawak had recognised is the custom or adat of "*temuda*" which was subsequently incorporated into "*Tusun Tunggu*". What is stated in "*Tusun Tunggu*" read as follows:

> Theoretically all untitled land whether jungle or cleared for padi farming (*Temuda*) is the property of the Crown. The fact that Dayaks do clear a portion of virgin land for the site of their padi G farms confers on them restricted rights of proprietorship over the land thus cleared. Once the jungle has been cleared it becomes "*temuda*". It is a recognised custom that "*temuda*" is for the use of the original worker, his heirs and descendants. This is the only way Dayaks can acquire land other than by gift or inheritance.

H [69] *The above declaration in "Tusun Tunggu" has been confirmed by the Federal Court in Bisi Jinggut v. Superintendent of Lands & Surveys Kuching Division & Ors [2013] 6 CLJ 805, where Suriyadi Halim Omar FCJ speaking for the court said:*

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> [37] From the totality of evidence and authorities referred in the course of the hearing, we are satisfied *that the creation of native customary land and rights acquired by a native of Sarawak, is conditional upon the adherence to custom or common practice of his community. For an Iban, it has the customary concept of Tusun Tunggu whereby NCR could be acquired by two mode namely clearing untitled virgin jungle en route to the creation of what is locally described as temuda and the other by receiving the temuda as a gift or inheritance. For the first mode, the common thread is that the acquisition of NCR starts with the clearance of the said untitled virgin land or jungle by a native, followed by the occupation of the cleared land and thereafter not allowing the land to be abandoned.* Once abandonment whatever NCR was created or acquired previously over the land would be lost. If the original owner abandons the land without more the community takes over. (emphasis added).

[70] The decision of the *Court of Appeal in Nor Anak Nyawai was strongly criticised by Mr Baru Bian describing it short of sound legal reasoning. With respect, we disagree. We are of the view that the decision of the Court of Appeal in Nor Anak Nyawai is the correct statement of law. It is not only consistent with decisions of our courts in Adong and Sagong but also with other Commonwealth countries that native customary law over land are founded upon the concept of native's custom of continuous occupation*. For example, in *Sagong*, the proprietary interest of the orang asli in their customary and ancestral land was limited only to the area that forms their settlement but not to the jungle at large where they used to roam to forage for their livelihood in accordance with their custom and tradition. As stated in the preceding paragraphs, the position in *Nor Anak Nyawai* is consistent with the methods of creating customary rights under the Sarawak Land Code *vide* s. 5.

[71] The principle propounded in *Nor Anak Nyawai* and *Bisi Jinggut* is parallel to the position under the Sarawak Land Code. Section 5(1) of the Sarawak Land Code provides as follows:

> 5(1) As from the 1st day of January, 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified to subsection (2), if a permit is obtained under section 10, upon Interior Area Land. Save as aforesaid, but without prejudice to the provisions hereinafter contained in respect of Native Communal Reserves and rights of way, no recognition shall be given to any native customary rights over any land in Sarawak created after the 1st day of January, 1958, and if the land is State land any person in occupation thereof shall be deemed to be in unlawful occupation of State land and section 209 shall apply thereto.

[72] Under sub-s. 2, the methods by which native customary rights may be created are:

> (2) The methods by which native customary rights may be acquired are:

A (a) the felling of virgin jungle and the occupation of the land thereby cleared;

(b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

B (d) the use of land for a burial ground or shrine;

(e) the use of land of any class for rights of way; or

(f) any other lawful method:

Provided that:

C (i) until a document of title has been issued in respect thereof, such land shall continue to be State land and any native lawfully in occupation thereof shall be deemed to hold by licence from the Government and shall not be required to pay any rent in respect thereof unless and until a document of title is issued to him; and

D (ii) the question whether any such right has been acquired or has been lost or extinguished shall, save in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the 1st day of January, 1958.

E [73] Notwithstanding the methods prescribed above under sub-s. 2, a permit can also be obtained from the Minister for the further creation of rights. Rights may also be available under the reserve system mandated by s. 6 of the Sarawak Land Code.

[74] Based on sub-s. 2 of s. 5 of the Sarawak Land Code, the underlying basis for the recognition of a particular native customary right to have the F force of law is occupation of and its usage according to the customary practices of the community or communities concerned. *Insofar as occupation is concerned it was held in Madeli Salleh that occupation need not be actual occupation. As long as the natives have control over the land through supervision and continual visitation it suffices.*

G [75] *Thus, we agree with the views adopted by the Court of Appeal in Nor Anak Nyawai. We find nothing objectionable in the views expressed by the Court of Appeal in that case.* On the contrary, we find that the Court of Appeal in the present appeals had erred in failing to consider that basis on the various orders of the Rajah that the rights to land could only be established by a native who had cleared the primary jungle for the purpose of farming H or cultivation.

[76] *Although common law recognises unregistered native customs, this is subject to the adherence of all tenets of customary land law. It is a well-established principle that having established that the custom of "pemakai menoa" and "pulau" exists, at the very least as a matter of fact, common law as developed in Malaysia further* I *requires continues occupation and/or maintenance of the land in question.*

[77] *Based on what we have discussed above, the native customs of "pemakai menoa" through the establishment of "pulau" falls short of the prerequisites as provided for under s. 5(2) of the Sarawak Land Code and thus, do not have the force of law as envisaged under art. 160 of the Federal Constitution.*

[78] Reverting to the specifics in the present appeals, in Appeal No. 27, in respect of the respondents and the 22 others who they represent, it is beyond doubt that *the native customary rights should be limited to the area of 2,802 hectares which had been cleared and cultivated and should not extend to the remaining claimed area of virgin forest maintained under the Iban custom called "pulau".*

Likewise in Appeals No. 30 and No. 42, the respondents as well as the others that he represents are not entitled to claim native customary rights over the 4,270 hectares of virgin jungle that had been leased by the State Authority to the Rosebay Enterprise Sdn Bhd. The said area had not been cleared and cultivated by the respondent and the others that he represents.

[20] The three questions in respect of which leave to appeal were granted were answered by the majority as follows:

[79] For reasons adumbrated, we would answer the question 1 in the negative. *We find that the pre-existence of rights under native laws and custom which the common law respects does not include rights to land in the primary forest which natives, like the respondents or their ancestors, had not felled or cultivated but were forests which they reserved for food and forest produce.*

[80] As to question 2, our answer is *that the High Court and the Court of Appeal are not entitled to uphold a claim for native customary rights to land in Sarawak based on a native custom of "pemakai menoa" and "pulau". What the law of Sarawak had recognised in a claim for native customary rights is the custom or adat of "temuda".*

[81] As to the question 3, we would answer it in the affirmative. *The Court of Appeal's decision in Nor Anak Nyawai that the rights of the native is confined to the area where they settled and not where they foraged for food is a correct statement of the law relating to the extent of native of rights to land claimed under native customary rights in Sarawak.*

[82] For the reasons given, we find the judgment of the Court of Appeal as well as the judgment of the High Court are unsustainable. *By majority, we allow all the three appeals. We set aside the orders of the courts below.* In the result the respondents' respective claims in High Court Suit No. 21-2-2009 and High Court Suit No. 211-2010 are hereby dismissed. In the circumstances of this case, we make an order that each party to bear their own costs. Deposits, if any, to be refunded.

[21] Reverting to the appeal before us, it is clear that question 1 which was the same as question 3 in *TR Sandah* (*supra*) has been answered in the affirmative by the majority judgment in that case. The answer to question 1 must be in the affirmative. As for question 2, in view of the answer to question 1 as aforesaid, and applying the majority of judgment in *TR Sandah* (*supra*), the answer to question 2 must be in the negative.

[22] As we said elsewhere in this judgment, at the beginning of his submission, learned counsel for the plaintiffs said as a finding of fact on the evidence adduced, the High Court had already acknowledged and found that there was in fact occupation. Learned counsel emphasised that occupation is not the issue. According to him, the question which arises is this – Does the NCR extend beyond the 380 hectares of cleared land which was allowed by the courts? He said his submission would address the issue whether NCR can exist over virgin forest areas or otherwise – the area for the natives to acquire food and where they hunt and collect jungle produce. According to him, it is the "*Pemakai Menoa*" and the "*Pulau Galau*" issue. That actually was the thrust of his submission and we have dealt with it. In other words, the finding of the High Court that the plaintiffs had acquired NCR over the 380 hectares of land in Lot 2 which were cleared, was not seriously challenged by the plaintiffs.

[23] According to the High Court, based on the plaintiffs' pleadings in the civil suits, the question was – Did the plaintiffs acquire or inherit NCR over an area of land which was shaded in yellow in the map marked M (exh. P2) attached to the statement of claim? The learned judge of the High Court emphasised that based on that map and the pleadings, the plaintiffs' claim in the civil suits was in respect of Lot 2 only and not over the area claimed within the perimeter outlined in red in exh. P2. Based on the evidence of PW1, Kudai anak Umeh (PW2), Jambai anak Jali (PW4), Joing anak Buau (PW5), Edward Ekau anak Simbeng (PW6) and Rajit anak Ambas (PW9) and the two publications (exhs. P13 and P84), the learned judge found that the plaintiffs' ancestors or predecessors have migrated and settled in the area claimed since 1930s. On a balance of probabilities, the learned judge found that the plaintiffs have acquired or inherited NCR over an area of land at Sibuti area. The question that remained for determination by the learned judge was, which and what area, and the size of the NCR land have the plaintiffs acquired or inherited? The learned judge found that the map exh. P2 cannot be accurate or correct because it was based on the survey carried out by PW12 on hearsay of some of the residents of the longhouses and on the points or landmarks shown to PW12 by some of the residents who did not testify. PW12 did not verify these points when he took the GPS readings. He did not take many GPS points on the perimeter of the claimed land nor the perimeter of Lot 2. From the aerial photographs and report

made by DW3 whose evidence he accepted, the learned judge found that in 1951, the ancestors and/or the plaintiffs had not cleared the virgin jungle in Lot 2 except for the area of 13 hectares which were cleared for shifting cultivation and situated on the western perimeter of Lot 2, nearer to the present Rumah Edward Ekau, previously known as Rumah Anggon. The learned judge considered the aerial photographs taken in 1961 and 1962 where His Lordship found that in 1963, the size of the cleared areas within Lot 2 had increased to 380 hectares. DW3 was not able to pinpoint the dates on these clearances. However, according to the learned judge, this meant that the 380 hectares were cleared between 1951 and 1962. On a balance of probabilities, the learned judge found that the plaintiffs have acquired NCR over 380 hectares of the land inside Lot 2 as shown in exh. D42.

[24] The Court of Appeal was not satisfied that the learned judge was plainly wrong in his decision to warrant appellate intervention. The Court of Appeal held that the decision of the learned judge of the High Court could not be said to be so unreasonable that no reasonable tribunal would have come to that conclusion. The Court of Appeal found ample evidence to support the findings of the learned judge of the High Court. The Court of Appeal also held that the learned judge's decision that the plaintiffs had acquired NCR over the 380 hectares of cleared land and not the rest of Lot 2 which was virgin/primary forests, not felled and cultivated prior to 1 January 1958 was consistent with the majority of the Federal Court in *TR Sandah* (*supra*) which according to the Court of Appeal was a majority decision which it should follow. In this regard in delivering the judgment of the Court of Appeal, Tengku Maimun Tuan Mat JCA (later CJ) held:

> [45] The plaintiffs relied on map "M" to seek *inter alia* a declaration that the plaintiffs have acquired NCR over the land shaded in yellow in the map exh. P2. As observed by the learned judge, in relation to the map exh. P2, the plaintiffs' claim was only in respect of Lot 2 and not over the area claimed within the perimeter outlined in red in exh. P2. Hence, our concern was whether the plaintiffs had created or inherited NCR over areas within Lot 2.
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> [46] Section 5(1) of the Sarawak Land Code provides:
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> > As from the 1st day of January, 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified to subsection (2), if a permit is obtained under section 10, upon interior Area Land. Save as aforesaid, but without prejudice to the provisions hereinafter contained in respect of Native Communal Reserves and rights of way, no recognition shall be given to any native customary rights over any land in Sarawak created after the 1st day of January, 1958, and if the land is State land any person in occupation thereof shall be deemed to be in unlawful occupation of State land and section 209 shall apply thereto.

A [47] It was the case of the first and the second defendants that the plaintiffs had failed to prove on the balance of probabilities that they had acquired NCR over the whole of Lot 2 prior to 1 January 1958 communally and/or individually; that even if the native plaintiffs had acquired any NCR within Lot 2 prior to 1 January 1958, it was only 13 hectares based on the aerial photographs taken in 1951; that further B and/or alternatively, even if the native plaintiffs had acquired any NCR within Lot 2 prior to 1 January 1958, it was confined to 380 hectares based on the aerial photographs taken in 1963 and that the native plaintiffs had no NCR over the balance of Lot 2 except the 13 hectares and/or the 380 hectares.

C [48] For the third and fourth defendants, it was submitted that the learned judge was not wrong in dismissing the plaintiffs' claim except for the 380 hectares of cleared land.

[49] We were not satisfied that the learned judge was plainly wrong in his decision as to warrant our appellate intervention. His decision could D not be said to be so unreasonable that no reasonable tribunal would have come to that conclusion. There was ample evidence to support the findings of the learned judge. Hence, it cannot be said that His Lordship had so fundamentally misdirected himself that we had a duty to intervene (see *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395; *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* E [1996] 3 CLJ 163; *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1; and *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453).

[50] In concluding that the plaintiffs had NCR over 380 hectares, the learned judge relied on the maps based on aerial photographs and aerial surveys over Lot 2 produced by DW3. The report of DW3 was exhibited F as D39. The 1963 aerial photograph in Appendix B of D39 showed that the area in Lot 2 was covered by primary forest except for approximately 380 hectares that were cleared. The learned judge further found that there was no dispute nor challenged by the plaintiffs to this fact.

[51] Further, the learned judge's decision that the plaintiffs had only G acquired NCR over the 380 hectares of cleared land and not the rest of Lot 2 which was virgin/primary forests, not felled and cultivated prior to 1 January 1958 was consistent with the majority decision of the Federal Court in *TR Sandah*

[25] We agree. We have considered all the evidence and material available H in the records of appeal ourselves and found that the findings of the learned judge of the High Court were supported by evidence. There was no appealable error which warrants our intervention.

[26] In the result, the plaintiffs' appeal is dismissed with costs to the respondents. The decisions of the High Court and the Court of Appeal are I affirmed. We order that costs to be taxed unless agreed by parties.